TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

DEPUTY PRESIDENT O'NEILL

AG2022/4902

s.185 - Application for approval of a single-enterprise agreement

Application by Symal Solutions Pty Ltd T/A Symal Solutions Pty Ltd (AG2022/4902)

Melbourne

12.30 PM, MONDAY, 3 JULY 2023

Continued from 23/06/2023

PN1

THE DEPUTY PRESIDENT: Good afternoon.

PN2

MR EVANS: Deputy President – Evans, initial J, appearing for the applicant again.

PN3

THE DEPUTY PRESIDENT: All right, good afternoon.

PN4

MR LILEY: Deputy President, Josh Liley appearing for the CFMMEU.

PN5

THE DEPUTY PRESIDENT: All right, now, just before we get too far underway, this is probably a vain suggestion but there obviously have been extensive discussions between the parties. Now that you're all physically here in person is there any interest in any further discussions, or do we just get straight into it?

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MR EVANS: I think the discussions may have been exhausted, subject to my friend's view.

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MR LILEY: That's right.

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THE DEPUTY PRESIDENT: All right, we'll get into it then.

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MR EVANS: Thank you, Deputy President. I think I might start with some administrative issues, given last week's hearing and some documents filed throughout the week last week. Before you is the hearing book, which has most of the material filed in this proceeding to date. The applicant will also seek, in this application, to rely on a statutory declaration of Emily Jeffrey. That was filed with the Commission some weeks ago. We would seek leave to rely on that because it was filed outside of the ordinary filing deadline set by Your Honour. Do you have a copy of that, Deputy President?

PN10

THE DEPUTY PRESIDENT: Sorry – this is which declaration? This is the Mr Bartollo or - - -

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MR EVANS: This is the statutory declaration of Emily Jeffrey.

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THE DEPUTY PRESIDENT: Oh, yes, thank you.

PN13

MR EVANS: I've got copies to hand up. I don't understand that that forming part of the Commission's file and being exhibited – we don't understand that to be objected to. I would seek leave for that to be marked exhibit A1.

PN14

THE DEPUTY PRESIDENT: A1 it is.

EXHIBIT #A1 STATUTORY DECLARATION OF EMILY JEFFREY

PN15

There's no objection, Mr Liley?

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MR LILEY: No, Deputy President – we've asked for that evidence to be filed twice in our submissions, I think, so we could hardly resist it now.

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THE DEPUTY PRESIDENT: All right.

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MR EVANS: And in terms of exhibits, Deputy President, could I just confirm: if there's a formal need to exhibit the hearing book, I can do that for you right now.

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THE DEPUTY PRESIDENT: I don't think so.

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MR EVANS: The second issue which arose at the initial hearing on 23 June was the statutory declaration of Mr Bartollo. That's no longer relied on by the applicant. There will – following the submissions of both parties during last week there is a further confirmatory statutory declaration signed by Mr Castricum. However, the parties have had discussions and we've been informed that Mr Castricum won't be needed for cross-examination. I'm happy for you to be heard by my friend on that, just for confirmation.

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MR LILEY: That's right, Deputy President.

PN22

MR EVANS: The issue as to the F17 forms part of our submissions that were filed on Friday 30 June. The essence of those submissions is that section 793 of the Fair Work Act in essence instilled Ms Ergel, who signed the initial F17 at the time the agreement was made, and that was filed with the Commission within the 14-day timeframe. The effect of section 693 in the Full Court of the Federal Court decision referred to in those submissions is that if the person signing the document had the express authority – the actual authority, sorry – or the ostensible authority of the company, then that is enough for Your Honour to consider that it was somebody with the authority to sign that document.

PN23

I can make the submission from the bench that Ms Ergel did have that authority to make that signing of that F17. If there is an issue, Deputy President, as to that,

then we would seek to have the statutory declaration of Mr Castricum exhibited so that it does complete the court's file. But in terms of that, I'm happy to be led by the bench.

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THE DEPUTY PRESIDENT: All right. Mr Liley.

PN25

MR LILEY: Thank you, Deputy President. This issue only really arises because the applicant's apparent disavowal of Ms Ergel's authority to make the F17 the morning of the hearing. We've had discussions as my friend said earlier, that it's now apparent that Ms Ergel did have that authority and there is no need to rely on any additional confirmatory F17. On that basis, we say that the Commission's file is already complete but as my friend says, we're happy to be led by you, whether you wish to have the Castricum F17 exhibited as well.

PN26

THE DEPUTY PRESIDENT: So am I satisfied that section 793 applies and Ms Ergel's statement is – the declaration is adequate?

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MR EVANS: That's correct, Deputy President.

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THE DEPUTY PRESIDENT: Yes, I am, yes.

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MR EVANS: Thank you. There's no other administrative issues, Deputy President. I'm happy to proceed to the closing submissions.

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THE DEPUTY PRESIDENT: All right.

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MR EVANS: There's been extensive written submissions before you, Deputy President, and they're contained in the hearing book. To the extent of the applicant's submissions, we do rely on our submissions dated 9 March and that's at page 89 of the hearing book. Before the Commission there are also a number of evidentiary material in relation to the applicant's case, that being the statutory declaration of Ms Ergel and that's at page 17. That's the F17; the statements of myself and also the statement of Emily Jeffrey, which is exhibit A1. I don't intend to go chapter and verse into the submissions today but give an overview of some of the key points arising out of the union's objections to the agreement and in summary, why the Commission can be satisfied that it can exercise its power under 186 of the Act to approve the agreement.

PN32

I'd like to start first with the series of objections the union make in their submissions. One of the first issues is in relation to the notice of representational rights. That was issued at the commencement of bargaining for the agreement. That's at page 52 of the hearing book – 53, sorry, Deputy

President. Issue is taken in relation to the coverage and the difference between the coverage – what is said to be the difference in the coverage of the NERR and the enterprise agreement that was finally voted on and made. We don't see an issue in that for a number of reasons. The first reason is there is no automatic rule that an enterprise agreement has to have the exact scope that was set out in the notice of rep rights. Scope is a matter for bargaining. There's many examples where the scope has changed through bargaining processes.

PN33

But if we look at the NERR itself, it does say it's going to cover the agreement – the agreement proposes to cover employees employed in the general building and construction under the building and construction onsite general award. That award treats general building construction and civil construction in essence as the same. There are very few clauses within the modern award which seek to differentiate between the two. I do accept they have defined and they do contain different work but when we are talking about initiating the bargaining process with the employees who have worked in the industry before, it is the same industry.

PN34

Now, the NERR refers explicitly to the award and that's why that submission is so important. If it didn't refer to the award then yes, Deputy President, there might be some issue. But because it directs the employees or relevant employees to the award – and I'll touch on access to materials later on – but they did have access to that award and because they are predominantly employees experienced in the industry, we say that is an important part in reading into the difference – well, we don't say there is a difference but the difference in language used between the NERR and the agreement.

PN35

In relation to whether it's broader or narrower – and I'm referring to the union's submissions in particular here – that point about general building and construction, because they are treated similar in the award, we take it, you know, from the top of that but drilling down, we then get to the point where the actual agreement itself, which is page 27 of the hearing book, talks about general building and construction only in relation to civil and construction work. Now, on that point, it's a more narrow and more confined scope. It's only going to cover employees performing general construction and building work to the extent that it is related to a civil construction project.

PN36

In the alternative, if there was to be an issue in relation to the notice of rep rights, which would have some issue with the approval of the agreement, we would seek the Commission's discretion under section 188(2) to waive or decide that it was a minor technical or procedural error. Now, in the union's submissions they refer to the case of Spotless Facility Services, which is reference case no. [2019] FWC 1331. I've got a copy of that, Deputy President, if you need.

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THE DEPUTY PRESIDENT: I have that one.

PN38

MR EVANS: Now, Spotless was a case before Commissioner Simpson. The issue in that case was Spotless had won work that wasn't contemplated at the time that the NERR was issued. They issued the NERR in relation to a series of work sites and a series of roles and quite rightly, that was challenged in the Commission. Commissioner Simpson found – and this is really in paragraph 32 and 33 of the decision – in paragraph 32 Commissioner Simpson finds the new work of Spotless as part of the town maintenance contact was not known to Spotless itself when it issued the NERR. The Commission then goes on at paragraph 33 to say:

PN39

The Commission is unable to accept that bringing within the scope of that agreement well after the issue of the NERR a new group of employees working in roles different to those in existence at the time of the NERR was issued would be described as a minor procedural or technical error.

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So the case before you, Deputy President, in this application is significantly different in the sense that the work that was always intended to do hasn't changed. The work of the employees throughout the whole process between bargaining, between the agreement was made even to today, hasn't changed at all. There hasn't been an effluxion of new workers performing work at different sites which is not covered by the agreement. The agreement coverage clause is to cover Queensland, New South Wales and the ACT. There is no indication of any other work at any other place outside of that coverage clause. Apologies, Deputy President, that'll be my phone.

PN41

So on that basis, Deputy President, we don't seen any barrier to you exercising your discretion if there is an issue with the NERR, exercising your discretion under 188(2). To the extent that you need to have regard to section 188(2) paragraph (b), which is in relation to the disadvantage, whether correcting a minor technical or procedural error would have any impact on or likely disadvantage to the employees – we don't say that arises either. We refer to our submissions at paragraph 14 – that's of our outline of submissions. That's at page 90 to 91 of the hearing book. And to highlight those, we don't see that there would be any likely disadvantage to employees with your exercise of discretion under that section because those employees have operated within the industry for many years prior to the agreement, prior to employment with the applicant. But they also had access to the explanatory material. They were aware because they participated in those meetings and I'll go into that later and they actively asked questions during those meetings.

PN42

One of the other issues or one of the other objections raised by the union is the covering email which was used to distribute the NERR and I referred to that page before, Deputy President. That is actually at 51. Now, the covering email – the issue taken by the union is the sentence: 'No further action is required from you at this stage'. There is no bold, no highlight – it's just plain text. That's before you, Deputy President. The evidence in this proceeding – and I refer to the stat dec of

Emily Jeffrey, exhibit A1 – is that the majority of the workforce had substantial experience in the industry prior to being employed by Symal and prior to voting on the agreement.

PN43

One employee was a new school leaver or a new entrant to the industry, being a recent school leaver, I should say. The terms of the email itself are plain. They're the terms. Indeed, it says, 'No further action is required from you', being the employees, 'at this time'. That's entirely correct. The obligation of the applicant is to provide the notice of representational rights at the commencement of bargaining or reasonably afterwards. It did that. Whether or not employees open that document or not is probably a matter for evidence and there's no evidence before you, Deputy President, whether they were impacted by those words or not. To the extent, I guess, that there is a concern again, I think 188(2) does operate in this regard to waive a minor and procedural technical error.

PN44

There is a decision by Deputy President Mansini before you, Deputy President. That's in the material. It is referred to in the submissions and I believe my friend will have something to say about that but we don't see any reason why there should be a departure from Deputy President Mansini as she then was, that had the decision that she could waive this – well, we'll call it an issue. I don't think it is an issue but she could waive it using section 188(2). It's really one of those issues where it's an eye attuned to error approach, Deputy President. The general reading and the natural reading of this is when you read it word for word. Employees opening that document, which is the usual course of corresponding with employees by the applicant, would have opened the document which is the notice of representational rights and could have read that notice and seen whatever it said. So we don't see it's an issue in this proceeding.

PN45

THE DEPUTY PRESIDENT: In relation to the matter before Deputy Mansini, in a couple of places in your outline of submissions you draw attention to and you make submissions about the CFMMEU not opposing a covering email and an NERR in the same terms. What do you say is the relevance of that? Do you press that submission?

PN46

MR EVANS: We do, Your Honour. We do press it. If I could presage it with this and give clarity to that submission: that submission around both the covering email and the terms of the notice of representational rights itself is really around what weight is subscribed to the union's objections in this application, given the acts and omissions that we say occurred in the other two agreement applications before the Commission. In the course of this Commission's jurisdiction and we realise and we accept that the union has been given a right to intervene and that's to assist you, Deputy President, and the Commission more generally, and that's why we say it is relevant.

PN47

If the union is going to assist you in this application for approval, its actions as an industrial participant which it relies on to have that permission to intervene is

relevant to its course of conduct in making these objections and raising these issues with you.

PN48

THE DEPUTY PRESIDENT: But it's not really a question of weight, is it, because surely the issue having been raised, it's my responsibility to ensure or assess whether statutory tests for approval have or haven't been met.

PN49

MR EVANS: Yes.

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THE DEPUTY PRESIDENT: And what's happened in another matter or what a party has done in another matter, I'm just not sure of the relevance of it.

PN51

MR EVANS: I accept that, Deputy President, and in particular because it is you who has to be satisfied as to whether the agreement has been – should be approved or must be approved or not. Another objection of the union, Deputy President, is what I term the genuine stake objection. There's a few objections to the approval of the agreement rolled up into this issue. Of course, this agreement was approved with four employees for voting on the agreement. We don't shy away that it's a small workforce. But there are very good reasons for that. We've set out in our submissions at paragraphs 29 to 32 the basis of why the employee group was that size. If I just take you to those paragraphs, Deputy President, I think it's commencing on page 91 – 89, sorry, Deputy President.

PN52

This is a business in its infancy in the sense that it's really in a chicken and egg situation. It needs an enterprise agreement, as do a lot of construction companies, to win major work and to bring on more people. Without the enterprise agreement providing that industrial certainty, it can't win the work it wants to into the future. I mean, that is the industrial situation that we live in but we're in the position where if the applicant brings on a significant amount of employees who it might want to employ one day, on a greater scale, and then doesn't have an enterprise agreement in place, meaning it can't bid for that major work, then we've got a problem with having employees sitting around with nothing to do.

PN53

So I think it's one of those natural situations where we have a business wanting to perform the work it does and yes, it does have a core workforce at the moment which it intends – quite expressly intends – to employ more people, informed the employees who were involved in the bargaining process of that very fact and I can take Deputy President to that later on in terms of genuine agreement. On that basis, that is a legitimate reason why the workforce did only have four people at that time and there's nothing in the Fair Work Act which prohibits that. I can go into a bit more detail if you'd like, Deputy President, but I will touch on I guess the employee experience and what they were told and what was explained to them during the access period in terms of those experienced employees having knowledge that this was an enterprise agreement that would have additional people employed.

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THE DEPUTY PRESIDENT: I'm just going to stop you for a moment.

PN55

MR EVANS: Sorry.

PN56

THE DEPUTY PRESIDENT: No, I'm just going to get over my coughing fit and whatever we're done (indistinct). Excuse me. In terms of going further into that, the question I have is, is there any issue in that there's no evidence of any of those matters that you've outlined? Is that in issue?

PN57

MR EVANS: No, Deputy President, because I think there is evidence. So the declaration of Emily Jeffrey - - -

PN58

THE DEPUTY PRESIDENT: It goes to the experience of the individuals.

PN59

MR EVANS: It goes to the experience of the individuals. In terms of the evidence as to the employees knowing about – what I should say is knowing about the business employing more people in the future. If I take you to the explanatory material which is at page 56 of the hearing book, this is an explanatory statement which was provided to the employees during the access period alongside the enterprise agreement, alongside the award, the NES fact sheet. The EBA scope – it should be the EA scope – is identified in the first row. It says in the second paragraph it directs employees to consider the other classifications in the agreement in the future, which is going to apply to other employees.

PN60

THE DEPUTY PRESIDENT: Thanks.

PN61

MR EVANS: In the submissions filed in this proceeding in relation to the union takes issues with agreement not being genuinely explained on the basis that the material incorporated into the agreement was not provided. We don't say that's an issue there. We say all the material that was incorporated to the agreement was provided. The major issue of the union appears to be that the Commonwealth building code was not provided to employees. Now, the building code was referred to in the disputes clause of the agreement. I could just take you to that page, DeputyPresident. It's clause 8. It's on page 29 of the hearing book. It's 8.3. The dispute in the process is set out in clause 8 must have regard to and comply with the code.

PN62

Now, we say that the main – the reference to the code, and it's a defined term in the definitions - - -

PN63

THE DEPUTY PRESIDENT: Yes.

PN64

MR EVANS: - - - we say it's not incorporated. It's not incorporated like a workforce policy might be incorporated in the sense that if a clause in an agreement refers to a workplace policy that is a document which is not publicly available. It's a document that's totally within the realm of the employer and there's plenty of decisions around there of – by the Commission where references to policies, workforce policies, if they are mentioned can be incorporated. We say the code is different. The code takes on a more legislative or public record-type reference. Reliance is placed by the union on the decision of CFMMEU v Sparta Mining Services. I apologise, the reference to that has been cut off from my printed page. Does my friend have it? I've got it, Deputy President. That is reference [2016] FWCFB 7057. In that case, if I take you, Deputy President, to paragraph 8 of that case - --

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THE DEPUTY PRESIDENT: Just bear with me.

PN66

MR EVANS: It's a decision of the Full Bench.

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THE DEPUTY PRESIDENT: Which paragraph was it?

PN68

MR EVANS: Paragraph 8 – in paragraph 8, the Full Bench replicates the clause that they were considering in that application. Clause 6.1 of that agreement proposed that the employer agrees to comply with state and Commonwealth occupational health and safety laws in any relevant industry codes and practice. There are other clauses referred to by the Full Bench of which referred to fitness for work and fatigue-management policies. They were incorporated and found by the Full Bench to be incorporated documents into the agreement. But if we take for a moment 6.1, in that case the employer argued that in reference to the decision which is referred to at paragraph 9 in that case – and that's being the decision of McDonalds Australia v SDA, which is [2010] FWAFB 4602.

PN69

In that case the Full Bench had decided that documents and material that were on the public record or publicly available or laws of the land were not incorporated into enterprise agreements by reference but mere reference to them because they were indeed laws of the land. Now, if I take you to paragraph 22, Deputy President, the Full Bench considers that submission by the respondent in that case and says they were taken to the McDonalds case but there was a further case, that being at paragraph 22, which is the National Tertiary Education Industry Union v University of New South Wales and that's [2011] FWAFB 5163. Where the Full Bench got to is applying that case, they said that case, the National Tertiary case, left open the possibility that there might be cases where the characteristics of the workplace and the composition of the workforce may require more than what the Full Bench indicated in the McDonalds case.

PN70

So indicated that in some cases, it might be required that material which might be in the public or the laws of the land or Australia, be provided to employees as an incorporated document. But they specifically talked about the circumstances or the characteristics of the workplace. Now, we're talking about the building code, the Commonwealth Government's building code, which as we set out in our submissions, has now been somewhat reduced in scope. But I would also refer to the employee experience that's before you, Deputy President. These individuals have been operating in the industry for a while. There's a number of years between them. If they weren't fully aware of the code, we don't know, because that's the experience of the employees.

PN71

THE DEPUTY PRESIDENT: Three of them, arguably.

PN72

MR EVANS: Three – sorry, Deputy President. You're quite right, yes. In terms of whether the code itself is incorporated by mere reference in one subclause in the disputes clause which would inevitably come before a Commission member in an arbitration or a conciliation, who might have reference to the code, we don't say that the code itself is incorporated into the agreement. Much like references to other legislation such as work health and safety legislation and even the Fair Work Act at large is not in incorporated document that one must provide to employees during the access period for it to be reasonably explained.

PN73

I mean, we can just see a situation where if that was the case the enterprise agreement access periods would be unwieldy with the amount of material that employees would have to refer to. Further to the terms of the agreement, there is some – there is an undertaking before you, Deputy President, that the applicant has provided on 7 December, and that's at page 79 of the hearing book. That undertaking as arisen as a result of issues raised by yourself, Deputy President. We say that the undertaking takes care of those issues and that in relation to the adult apprentices and the minimum rates for those adult apprentices, that there is no issue, there's no barrier to the approval of the agreement once that undertaking has been accepted.

PN74

THE DEPUTY PRESIDENT: I don't think that's contested in respect of those matters. I think the CFMMEU's contention in relation to the BOOT is about the disputes procedure.

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MR EVANS: Yes.

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THE DEPUTY PRESIDENT: Yes.

PN77

MR EVANS: And on that point, Deputy President, we say that's – (1) we don't say it's a BOOT issue; (2), we say that dispute's clause is directed to the Commission's jurisdiction. It's conferring jurisdiction on the Commission - - -

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THE DEPUTY PRESIDENT: Sorry – you say it's not a BOOT issue because compared to the award there's no - - -

PN79

MR EVANS: That's correct, Deputy President. We say in any dispute the Commission is conferred with a range of jurisdiction, depending on what the agreement says and what it doesn't say. There are of course things which can't be conferred on the Commission. There are clauses which might make dispute clauses inoperable or not able to form part of enterprise agreements. We say this is not one of those issues. We say by the disputes clause referring to the issues which it does – and I'll just pull it up so I've got it for reference before you, Deputy President. I believe it's clause 8.12, which is on page 30 of the hearing book – 8.11.

PN80

THE DEPUTY PRESIDENT: Yes.

PN81

MR EVANS: Page 29 – that is conferring the nature of the jurisdiction on the Commission but there is nothing there that would detract away from the Commission's powers to make any decision. And in fact, if the Commission was to make a decision that was against the terms of the agreement or against the terms of the Fair Work Act it would be in error. We don't say that 8.11 operates to allow the Commission to make a decision which it would not already be able to make by terms of the disputes clause in the agreement. It's merely directly the Commission to have some consideration as to those issues, which is that the business operate in a safe, reliable and profitable manner.

PN82

In terms of calculations of rates and allowances, if there was a dispute as to those allowances, the agreement terms are the agreement terms and there would have to be a decision on what the agreement says. If there was an ambiguity that needed to be fixed, there is an application for that and that has its own jurisdiction. But we say before any Commission proceeding there's always multiple chances of success for either party and it depends on what is before the Commission at the time. That's what we say that clause does: it's just leading the Commission to having consideration as to that point. But in terms of affecting its decision, it's not going to affect the type of decision it might have to make in the hypothetical examples that the union proposes in its submissions.

PN83

THE DEPUTY PRESIDENT: And that's essentially because the correctness standard applies and any arbitration out of section 739 matter and therefore there's no room or role for 8.11 to apply (indistinct).

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MR EVANS: That's right, Deputy President.

PN85

THE DEPUTY PRESIDENT: Okay.

PN86

MR EVANS: I mean, it's one of those clauses. I mean, there's a lot of clauses in enterprise agreements which are of that nature, which are there to guide the Commission but also guide the parties in the sense of what the parties are trying to obtain by way of objectives of having an agreement in the first place. So on that basis and before you, Deputy President, the material in relation to the approval of the agreement and the steps taken which can satisfy you that you must exercise your powers under 186 they are set out predominantly in the statutory declaration of Stephanie Ergel.

PN87

During the access period employees had the benefit of not only the enterprise agreement but the benefit of the explanatory material which I referred to before and that's at page 56 of the hearing book. The explanatory guide is in plain English. It's shorter than the enterprise agreement. It gives a reasonable explanation of the effect of those terms to employees in easy-to-understand language. Meetings were held – a meeting was held during the access period with employees and as an indication of the engagement of those employees during the access period, Deputy President, I could take you to page 66 of the hearing book. That is an email from Stephanie Ergel thanking all the employees for participating in the meeting to discuss the enterprise agreement and the terms of the enterprise agreement and their effect.

PN88

But it also attaches an FAQ, which is at page 67 of the hearing book and I'll just take you back to the email for a second, Deputy President. The middle paragraph refers to – there were questions raised during the meeting and we've taken time as – the applicant's taken time to prepare the FAQ document. If I take you to the FAQ document at pages 67 and 68 of the hearing book, the questions are what I would term industry-related questions applying to employees thinking about the terms and conditions of their employment and what they are going to be voting on, subsequent to receiving that FAQ. On that basis, given the terms of the explanation document, given the meetings with employees, given the experience of the employees and steps taken by the applicant to explain the terms, our submission is that you can be satisfied under section 186 of the Fair Work Act that this agreement was genuinely agreement and can be approved. To the extent that, Deputy President, any of the objections raised by the CFMMEU in the submissions and that I've canvassed in these closing submissions today potentially bring any error into the approval process, we say those can be cured by section 188(2) as minor and procedural technical errors and that is both in relation to the submissions I've given but on the overall basis of the material before you that these employees knew full well what they were signing up to and they were willing to vote up the agreement.

PN89

I should say the employees have been waiting a long time for this and they're looking forward to an enterprise agreement and I can inform the Commission that they are being paid the rates that they would have been paid had the agreement been approved last year. If there's anything else I can assist you with, Deputy President - - -

PN90

THE DEPUTY PRESIDENT: Not at this stage, thank you. Mr Liley.

PN91

MR LILEY: Thank you, Deputy President. Now, as Mr Evans has noted, the parties have had the opportunity to file extensive written submissions and so I equally don't intend to take up the Commission's time repeating every word of what we've already filed. There are five issues that are raised in our submissions: as my friend has already noted, the first is in relation to the NERR, the second relates to whether the employees who voted to approve the agreement had a genuine stake in its terms, third is whether the employer took all reasonable steps to provide copies of the materials incorporated in the agreement, fourth, whether it took all reasonable steps to explain the agreement and its terms and fifthly, the issues relating to the BOOT.

PN92

Before I get into those I'll just note – this doesn't seem to be in any kind of controversy – but this application falls for consideration under the pre-6 June rules relating to the BOOT and genuine agreement. The notification time and the date the agreement was made were both last year so the Commission is not bound to have regard to the statement of principles or the new rules regarding the BOOT. It's all under the old scheme.

PN93

THE DEPUTY PRESIDENT: I had to pull out my whole copy of the legislation.

PN94

MR LILEY: Yes, we don't have a new one yet so we didn't have a problem with that. Starting with the issues relating to the NERR: we say there's no basis for the applicant's submission that the NERR is not defective. The real issue here is whether the Commission may disregard the errors relating to the NERR as minor or procedural technical ones that were not likely to disadvantage the employees. We say it's clear the applicant always intended to make a civil construction agreement. There's no basis for suggesting that the applicant originally set out to make a building agreement and the scope grew and changed over the course of bargaining. There was no bargaining, really.

PN95

The applicant says that there is no automatic rule that the NERR has to match the agreement. We say that's correct but that's not our submission. Our submission is that the applicant is obliged at the time it distributes the NERR to identify what it was then intending would be the scope of the employer's agreement, which we say wasn't done here. My friend's submission is that building or general building and construction and civil construction are in essence the same under the award. We say that submission has no basis and is divorced from industrial reality. It's a significant distinction. It's the same award but they're essentially different industries. They're not that many operators that operate in both. There's very limited overlap.

PN96

There's some incidental overlap, for example, as the agreement contemplates, that relates to – for example – buildings that are to house people being constructed on a civil construction site. But we say it's quite divorced from industrial reality to say that those two are the same and you can just disregard the reference to one in lieu of the other.

PN97

THE DEPUTY PRESIDENT: Just on that, so I absolutely understand that there is a distinction legally under the award and it is industrially a term of art with great significance. But I'm not sure it follows from that, that the description of general building and construction has to have those meaning and clearly does have that meaning in the context where the award encompasses both. It's building and construction general award. I mean, there's no evidence either way but just as a matter of logic and practicality, to assume that – for me to assume, essentially, that all employees in the industry understand that legal import of the distinction and the industrial term of art that they are, seems to me to be something of a stretch.

PN98

MR LILEY: Deputy President, we would say that it's not only a term of art but also of significant practical distinction. General building and construction is what happens in the CBD with the tower crane. Civil construction is building a highway. There's very limited overlap. It's well understood in the industry. It's true there's no evidence about this but you can have it from the bar table that these are not minor distinctions.

PN99

THE DEPUTY PRESIDENT: No, no, I absolutely accept they're not minor distinctions. But both are encompassed in the same award which has the heading of general building and construction, which is what the NERR provided.

PN100

MR LILEY: That's right, Deputy President. There are other examples of awards that have covered more than one industry, shall we say? And yet the distinction between the industries covered in those awards is significant. So if you take for example the manufacturing award, it covers all kinds of different manufacturers, it covers food manufacturing, it covers metal fabrication, shops. To suggest that the distinction between those is irrelevant is I think another submission that would fly in the face of both practical reality, industrial reality but also in the face of the significant distinctions between industries that the awards set up.

PN101

The other matter to note in relation to that submission is that most of the awards contain largely identical terms so that the analogy between the terms that apply to general building and construction and civil construction within one award, to suggest that that means there is no distinction between those industries again by analogy would require the – you do accept the conclusion that because the terms of the cleaning award are largely similar to the terms of the construction award, there is no distinction between those two industries. We suggest that the submission can't be maintained. There's a clear distinction. Everyone knows

about it both on the job and in this place it's – like we say, there's no basis for the applicant's submission that there is no error here.

PN102

The real issue is whether it's minor, procedural, technical where there was a disadvantage. In addition to that error there is also the statement which my friend's referred to in the covering email that suggests there is no further action required from you at this stage. As we said in our written submissions, this a literally true statement but one that is apt to deter employees from exercising their representational rights and which appears to be (indistinct) under that heading by Deputy President Mansini as she then was in the approval decision relating to the infrastructure agreement. As we've said in our written submissions, we suggest that you do not follow that decision for a number of reasons. It's not supported by detailed reasons. The Deputy President had no – didn't have the submissions at that point and it's also apparent that the Deputy President didn't consider the separate error about the description of the coverage between the two instruments.

PN103

Those two errors, we say, are compounding. This is a matter that goes to section 188(2). First, the workforce receives an email from the employer tends to suggest if it doesn't outright direct them that they do nothing to exercise their bargaining rights and second, if they do open the attachment, it refers to bargaining for an agreement to cover an industry they're not employed in, work they're not going to do. So we say that those errors, taken together, will act to defeat the purpose of the NERR and as a result there's a likely disadvantage to employees in the relevant sense and the Commission cannot disregard those errors as a result.

PN104

Moving on to the question of genuine stake – actually, before I do that, this is repeating the written submissions a little bit but my friend mentioned there was the question of what employees made of this – these errors - in fact being a matter for evidence. Those employees, as we've said, are not known to us. They're properly to be considered in the applicant's camp. The lack of evidence on this heading is really a matter for the applicant. I think at this point of my friend's submissions you queried the relevance of our – the action we took in the previous proceeding. We would say that that's simply not relevant. There's no question of any kind of issue estoppel arising and the limited steps that were taken in the previous proceeding as set out in our written submissions can't be used as a basis for any inference against us.

PN105

Moving on to the issue of genuine stake: the Commission now has the stat dec of Emily Jeffrey concerning the characteristics of the voting employees. As a result the Commission has now at least got some material before it which puts it in a better position to assess the representativeness of the voting cohort. We don't challenge their evidence and we haven't required Ms Jeffrey for cross-examination. But there are, I'll just note, a couple of things about that evidence: first, the relevant experience of each employee as either a plant operator or a labourer. None of the employees is a tradesperson. None of the employees have any experience in general building and construction according to the stat dec. None of the employees is an apprentice, none of the employees has

any experience or training in concrete pumping, concrete pouring, formwork and the like. And finally, none of the employees has any experience or training in traffic management. The sixth point, actually, is a little different: it appears that employee no.2 may be a supervisor and as a result outside the proposed agreement's coverage.

PN106

It's not entirely clear on the face of the stat dec what of the matters listed under the heading, 'Employee experience', relates to historical employment and what relates to current employment but there is at least a reference to being a leading hand, being a supervisor and in the agreement explanation document it notes that the agreement doesn't apply to supervisors and forepersons. So the Commission has put on inquiry there. Noting all those points, those six factors weigh against a finding that the employees were representative of the range of classifications for which the agreement provides such that they had a genuine stake in its terms, such that it could be said to be genuine agreement.

PN107

I'll just note that if the Commission has a concern about this it may be addressed by giving an undertaking to limit the agreement's scope, to limit the classification structure to reflect the composition of the voting cohort more closely, for example, by removing the tradesperson classification, removing the concrete classifications, removing the traffic management classification.

PN108

THE DEPUTY PRESIDENT: The relevance of the classifications that you've just described, and this is probably a very dumb question, but it's essentially your proposition that those classifications are in the building and construction side and not the civil construction.

PN109

MR LILEY: Not quite, Your Honour – those are classifications that – the situation is this: the applicant is in the industry, it's really a plant hire business, as I understand it on the basis of the materials filed. They've submitted for approval an agreement which goes beyond those activities and into civil construction generally, including incidentally general building. This appears to be on the basis they really filed a copy of the infrastructure agreement – that is the Symal Infrastructure Pty Ltd agreement. The situation that arises is that they've got a – they're conducting a more confined business of plant hire. They've got employees who work in plant hire and they're seeking to approve an agreement that applies more widely. So those classifications that I've referred to – trades persons, the concrete-related classifications, the traffic management classifications – they are classifications that you see in the building industry as opposed to the civil industry. But you also see the plant operation classifications across both. That's not really the distinction I'm seeking to draw there. These are just the classifications that don't appear to be reflected.

PN110

THE DEPUTY PRESIDENT: By the experience of the cohort - - -

PN111

MR LILEY: By the experience of the voting employees, that's right, Your Honour. Moving on to the question about providing copies of the incorporated materials - - -

PN112

THE DEPUTY PRESIDENT: Before you do, you say in relation to the suggestion that the declaration that employee 2 raises a question about whether the material is in relation to their previous experience or employment under the current employment – and that was Commission inquiry – what does that inquiry look like in circumstances where there is declaration from the employer that the employees who voted on the agreement are the employees that would be covered by it? What in particular steps do you say that the Commission is obliged to take?

PN113

MR LILEY: Deputy President, this is really a matter that probably should have been raised in cross-examination, I must say, and my friend might be able to assist you if he can get instructions now. The question is whether the employee no.2 had a stake in the agreement in the sense that his employment was actually covered by it. The Commission will be aware of circumstances where employers have sought to game the system by having an agreement voted up by employees who are not covered by it. We say the evidence doesn't go that high but it is at least an issue that arises on Ms Jeffrey's stat dec.

PN114

THE DEPUTY PRESIDENT: Well, that's what I'm kind of teasing out because the statutory declaration describes this as their skills and experience rather than – so on the face of it, it reads as though it's a description of past experience and skills rather than their current role and in circumstances where the declaration identifies that the employees covered by the agreement are the employees that were able to vote on it. What is the nature of the inquiry that you say that leaves hanging?

PN115

MR LILEY: Deputy President, my friend advises me that employee no.2 is employed as an operator. We would say the question arises by inference. The stat dec in its terms being silent about the current or really relevantly the employment at the time of making the agreement. In any event, I understand the issue doesn't arise so I won't pursue it.

PN116

THE DEPUTY PRESIDENT: All right.

PN117

MR LILEY: Moving on to the question of - - -

PN118

THE DEPUTY PRESIDENT: Just so that I'm clear, what if anything is pressed in relation to the genuine stake submission?

PN119

MR LILEY: What's pressed in relation to genuine stake is the matters that I noted earlier about the representativeness, leaving aside employee 2's employment – so the relevant experience of each employee being either as a plant operator or a labourer, none of the employees being a tradesperson, none of the employees having experience in general building and construction, none of the employees having experience or training in relation to concrete works, none of the employees being an apprentice, and none of the employees being – having any experience or training in traffic management. We say those factors weigh against a finding that the voting cohort was representative of the classifications – the broader classifications included in the agreement such that it can be said that those employees had a genuine stake in the agreement's terms such that it can be said they genuinely agreed to the agreement.

PN120

THE DEPUTY PRESIDENT: I'm not sure if you're aware of it but I'm interested in your – any comments you wanted to make or submissions. There's a decision of Deputy President Asbury, as she then was, in relation to the OPS Enterprise Agreement 2022 where there was submissions made about the nature of the inquiry that's required where there's a small number of employees in relation to an agreement that has broader coverage. On the face of it, it has quite some similarities with the present situation. I am not sure if you're familiar with that decision.

PN121

MR LILEY: No, Deputy President, not as I stand here.

PN122

THE DEPUTY PRESIDENT: I am comfortable giving you a few minutes if you would like to have a look at that and give you an opportunity. It's just that it does seem to have potentially some relevance and I would be interested to hear what you would say about that.

PN123

MR LILEY: I might be able to deal with it on my feet if there's a particular point you would wish to raise.

PN124

THE DEPUTY PRESIDENT: It was an application involving a small number of employees in respect of an agreement that had much broader coverage. But essentially the Deputy President's conclusion was that the small number of employees had extensive experience in the industry, broadly. Essentially the proposition seems to be that there is required to be some basis for this obligation to make some inquiry. It's quite different to the One Key situation where it's apparent that the employees in that instance had no genuine stake and the agreement was covering awards and classifications that bore no resemblance whatsoever to any of their experience.

PN125

It's a more finely balanced proposition here it seems to me, and you have got decisions like this one at one end of the spectrum where no inquiry is said to be required, and you have got One Key at the other where there is said to be no moral

authority for the agreement and therefore the agreement can't be validly made. And I am just curious as to where you see on the spectrum this one sits and the nature of any such inquiry that that triggers.

PN126

MR LILEY: Thank you, Deputy President. This is clearly not a case like One Key or KCL where you've got an agreement that covers a myriad of different awards. We can't make that submission here. The submission that we have been making up until the making or the filing of the Jeffrey stat dec there has to be some information before the Commission for it to be satisfied that where there's a small cohort of employees that they are leveraging a stake in the range of terms that are regulated by the Commission - by the agreement I should say. And that the Commission can't be satisfied of those matters without any material before it. We would say that the inquiry is the same, but the result might be different.

PN127

So unless there is anything further in relation to genuine stake I will move on to the question of whether the incorporated materials were provided. I have (indistinct) in our written submission there are two issues that the applicant raises. First whether the code was incorporated, and second whether if it was incorporated the characteristics of the workforce made it such that it wasn't required to be provided.

PN128

The first question, whether the code was incorporated, the building code doesn't have legislative force in and of itself. The way it works is it imposes a list of conditions, or at least this is how it used to work before it was gutted, it imposed quite a broad range of conditions on builders who sought to tender for Commonwealth funded construction work.

PN129

It was not until the builders sought to tender that the obligation or the condition applied. And so it's not a case we would say like OH&S legislation where the employer is obliged to comply with them in any event, and so the reference to the OHS leg in the agreement doesn't incorporate that legislation. The building code is given effect by virtue of the reference to it and not without it.

PN130

THE DEPUTY PRESIDENT: So under the agreement it's given life in circumstances where under the code it wouldn't necessarily be.

PN131

MR LILEY: Exactly. The reference to an agreement is necessary to give it effect as far as determining the outcomes of arbitrations or dispute procedures otherwise. It wouldn't have that effect other than because of the reference to it in the agreement. We refer to the Full Bench decision in McDonald's case which dealt with a reference to the Long Service Leave Act in an enterprise agreement. That Act was, despite being part of the law of the land, given effect in the agreement was greater than the effect it had on its own, and for that reason the Full Bench held it was incorporated. We would say the reference to the code in

this case is to the same effect, that it extends the legal significance of the code, the legal effect of the code beyond the effect it has a standalone document.

PN132

THE DEPUTY PRESIDENT: Okay, I follow.

PN133

MR LILEY: Leaving that point to one side the second question is then whether the characteristics of the workforce were such that the code was not to be provided in if it were incorporated. We would say that there's no evidence to suggest that the voting employees, although experienced in the industry, were so sophisticated they knew what the code was, where to find it, what it meant for it to be incorporated.

PN134

The code is quite a technical document. It's not easy to find compared to other laws of the land for whatever reason the way the Commonwealth legislation register works. It's a little bit more difficult to find. Although we don't challenge the evidence that these employees had the years of experience that the applicant says they had, we say it's a step too far to suggest that their years of experience in the civil construction industry meant that they were so industrially sophisticated that they could find the code without any reference to it in the explanation in the agreement by the employer that they would know without having to be told.

PN135

THE DEPUTY PRESIDENT: I think you have calibrated the knowledge and experience of the employees perfectly to rely - knowledgeable enough to know the distinction between civil building and construction, but not so as to know about the code.

PN136

MR LILEY: Thank you, Deputy President. The code we would say is a term of art. It's notorious, but the way it works in particular I think is not - I don't think it can be assumed.

PN137

THE DEPUTY PRESIDENT: I'm teasing.

PN138

MR LILEY: One other thing I will note about the code is that by its nature it's apt to vary very significantly if there's a change of government. It's gone from ruling out essentially every union clause in an agreement to now requiring almost nothing. In the event of another change of government it's apt to go the other way again. We say because of that circumstance it was incumbent on the applicant to explain the incorporation of the code and what that meant for employees' working conditions, and for that reason it can't be disregarded as a minor procedural technical error that was not likely to disadvantage employees.

PN139

THE DEPUTY PRESIDENT: That's the part of the submission that I have greatest difficulty with. Given that it was minimal at the time, if there was a

failure to explain the terms if it was incorporated, that's not likely to be of any great moment given the minimal provisions of it. But to say that because there is this possibility if there's a change of government and the code that there may be some changes to it or give some description of the historical context of it that is quite a step, and whether that's a reasonable step as required under the legislation is what I'm struggling with a little.

PN140

MR LILEY: I understand, Deputy President. I really can't put it any higher than that. It is a possibility. The code isn't incorporated as at a particular date, so that the application of that term is certain. The possibility that it be varied as significantly as I have just - - -

PN141

THE DEPUTY PRESIDENT: Sorry, is your submission that it is incorporated at a point in time or as varied from time to time?

PN142

MR LILEY: We would say it's incorporated, it's varied from time to time. I mean it would be necessary to say that it was incorporated as at a particular date if a particular version was required to be - was intended to be incorporated. I think it's a provision of the Acts Interpretation Act which has that effect, the agreement being an instrument under Commonwealth legislation. I hear what you say about the significance of the possibility that the code might be varied in the event of a change of government. As I say I can't put it any higher than that.

PN143

THE DEPUTY PRESIDENT: Okay.

PN144

MR LILEY: That conveniently leads me into the question of whether the agreement was adequately explained and the terms of the agreement were adequately explained. The incorporation of the code we say clearly was explained, as well as the less beneficial terms of the agreement. I would like to expand on one of the matters that's raised in our written submissions, which is the question of whether the explanation that was given was adequate to the circumstances of employees referred to in section 180(6). So the recent school leaver in particular being a young employee.

PN145

The Full Bench decision in McDonald's which we refer to a few different times says that you don't need to have any evidence that there was a different explanation given or that further steps were taken to explain the agreement to employees in those cohorts, in particular young employees, provided that the explanation provided to all employees was adequate, including to circumstances of those employees. That being said the Commission still must determine that it was an adequate explanation for the circumstances of those groups.

PN146

The other category which is presently relevant is workers who didn't have a bargaining representative. In that case that's all of the employees. Sorry, in this

case it's all the employees. There's limited authority on this part of section 180(6). The explanatory memorandum for what it's worth says that for these employees it may be reasonable for an employer to provide a more detailed explanation of the agreement. Such cases as there are, are consistent with McDonald's. The applicant is not required to show that any differentiation in the explanation was provided, provided that the explanation that was given to all employees was adequate including for unrepresented employees.

PN147

For example the initial details that may be reasonable for the employer to explain to unrepresented employees might include explain the reasons why employees may wish to vote not to approve the agreement, in particular ensuring that the terms of the agreement that are less beneficial are explained. Another step that might be taken in a particular case is to explain that voting to approve the agreement means that the wages and conditions are fixed for four years, or for the term of the agreement I should say, and that industrial action cannot be taken during that period.

PN148

These steps could be said to be directed towards putting employees in a position they would have been in if they were represented. In this case the obvious step that would have been reasonable for the employer to take, and that it did not take, was to explain the less beneficial terms of the agreement compared to the award. One of the reasons that that step would have been reasonable to take is at least some of those less beneficial terms had already been identified to the applicant, or the relevant personnel acting on behalf of the application by Mansini DP in relation to the infrastructure agreement, which is relevantly identical, and refer to the annexures to my statement which disclose that those issues had been raised by the Deputy President. Moving on a little bit - - -

PN149

THE DEPUTY PRESIDENT: Just before you do, the steps that you were just describing dealing with not being a bargaining rep, are they coming from authorities or are just submissions that you're making?

PN150

MR LILEY: They're submissions.

PN151

THE DEPUTY PRESIDENT: And presumably it's your contention that the explanation that was provided to all of the employees did not meet the needs or was not reasonable given the young school leaver at least?

PN152

MR LILEY: The position of the young school leaver is I think less clear. Again there's limited authority on what initial steps might be reasonable as far as explaining things to a young person. Again this is just a submission, but you might say an additional explanation might be reasonable for someone who presumably had less industrial experience.

PN153

The guidance that the explanatory memorandum gives is that for young people the explanation might be provided to their guardian or their parent. We would say in the first place for the young person it's only one out of four, and so the Commission might find that even if the explanation was inadequate it wouldn't have made a difference to the outcome. The unrepresented employee is not in a similar category, it's all four of them, and such authority as there is supports providing a greater explanation rather than less.

PN154

The other matter which I should - this might be calibrated - the next thing that I was going to say is that the less beneficial terms, or at least some of them, have as my friend has noted been addressed by the undertakings that have been provided. And so there's Commission authority to the effect that an undertaking that corrects a less beneficial term in the agreement, or that I should say deals with a failure to explain a less beneficial term of the agreement means that the Commission can be satisfied that the explanation was adequate.

PN155

If the Commission has a concern in this respect it can be cured by an undertaking. So there's the Karijini decision, the MMS decision. The relevance of that being that if you have a concern about the explanation that was provided to the unrepresented employees it might be cured in relation to those less beneficial terms. But we say undertakings haven't been provided in relation to all the less beneficial terms, and so the failure to explain - the Commission is not in a position to determine that this failure to explain has been adequately cured.

PN156

THE DEPUTY PRESIDENT: And that's in respect of the incorporation of the code and what's said to be the detriment in the disputes procedure.

PN157

MR LILEY: That's right, your Honour. Finally, I will just quickly note our submissions on the BOOT. We have identified various terms of the agreement that are less beneficial than the award. Some of those are financial, some of those are non-financial. The financial detriments have been dealt with. There's an undertaking before the Commission to deal with those detriments. The non-financial BOOT detriment regarding the dispute settlement procedure hasn't been addressed in this way.

PN158

My friend says this clause doesn't have legal effect or doesn't control the Commission's jurisdiction in determining a dispute in accordance with the procedure. That I think flies in the face of the fact of the term itself. The Commission in construing the agreement is obliged to construe the agreement as a whole, including this term.

PN159

Putting on my industrial officer hat if I were to see this clause in the agreement I would be concerned that it would - as my friend says guide the Commission in its consideration of the dispute by having regard to an additional fact that it is not always present, it would not otherwise be bound to have regard to, and certainly

isn't bound to have regard to under the award. For that reason we say it's a detriment when compared to the award, and so relevant to the application of the BOOT. And, Deputy President, unless there's anything else I can help you with those are the submissions.

PN160

THE DEPUTY PRESIDENT: No, thank you, that's helpful.

PN161

MR LILEY: Thank you, Deputy President.

PN162

THE DEPUTY PRESIDENT: Mr Evans?

PN163

MR EVANS: Deputy President, just a short reply. In relation to the submissions on the NERR I think this brings to the foreground - and I am cognisant of what you said before, Deputy President, that this is the issue at the CFMEU's action in previous applications. And if I could just take you briefly to the hearing book at page 97. At page 97 is a notice of employee representational rights issued by Symal Infrastructure to commence bargaining for Symal Infrastructure and the CFMEU (Victorian Construction and General Division) Enterprise Agreement 2020 to 2023, which is proposed to cover employees engaged in general building and construction under the Building and Construction General On-site Award 2010, and that sounds familiar because those are the terms of the NERR in this current application.

PN164

The enterprise agreement which was made flowing from that NERR - and I have got copies I can hand up to you, Deputy President, if you wish. I have got a copy for my friend as well. The coverage clause in that says it will cover:

PN165

Employees mean employees of the employer who are construction workers engaged in tradespersons, apprentices, labourers and plant operators performing work in a building, civil and engineering sectors under the award.

PN166

It's consistent with our submissions on the NERR. That is exactly the point made, civil construction, general building construction, they are dealt with the same award. In respect of it being a term of art in the CFMEU's own agreement with another entity they have been taking somewhat of the same approach.

PN167

In relation to genuine stake, just quickly, to the extent that the submissions are in respect of there being nobody in the voting cohort in roles such as traffic management, concreting, that's correct for the reasons I went through earlier. We have got those legitimate reasons as to where the business is at, at the moment and what it's trying to do in the future. I will just make note of the building and construction award, which under civil construction also means traffic management, which is 4.3 paragraph (b) sub-paragraph (vi). So civil construction

includes traffic management, and also sub-paragraph (x) at the same sub-clause, civil construction also includes concrete work for a whole host of work to do with causeways, aerodromes, tramways, roads, railways, et cetera.

PN168

Lastly, in terms of genuine agreement, Deputy President, and the explanation and the terms of the explanation of the agreement and the terms of the effect that it would have on employees, you have before you the quite detailed, but also in plain language explanatory statement, and I hear the submissions in relation to the young - or the school leaver - shouldn't presume somebody is young or old. If I can take you, Deputy President, to page 56. That is the explanatory statement.

PN169

And in terms of going further in terms of explaining the terms and the effect of the agreement it was mentioned that you might expect there to be some explanation that the salaries or the wages were capped or they would increase year on year, but at the end of the four years that would be it, they would be locked in to those rate increases under the agreement.

PN170

Page 59 of the hearing book does talk about rates of pay and allowances in that explanatory statement, which was given to employees and the employees were guided through during the meeting with the applicant during the access period. If you look at the rates of pay and allowances which talks about clause 17 it is in plain English. It is clear on its terms that there will be rate increases on July each year for the length of the agreement.

PN171

Just finally - sorry, I did say finally before, but this is finally for real - on the incorporation point it is not the submission of the applicant, it is not so much that - sorry, on the dispute resolution clause submission in relation to 8.11 of the agreement the submission is not so much that it doesn't have legal effect, it's that the Commission jurisdiction flows from a dispute clause in the agreement and it can have consideration to that. But again the Commission is bound by whatever jurisdiction it is conferred subject to the Fair Work Act and what it can determine in relation to disputes brought under enterprise agreements.

PN172

THE DEPUTY PRESIDENT: The fundamental proposition is that it's not a BOOT issue, at least in respect of 8.11.

PN173

MR EVANS: Yes, Deputy President.

PN174

THE DEPUTY PRESIDENT: In relation to the question about the code in clause 8.3 would your client be prepared to give an undertaking to not rely on that clause?

PN175

MR EVANS: If I could have a minute to seek those instructions.

PN176

THE DEPUTY PRESIDENT: I should say, Mr Evans, please don't kind of read too much into that, it's just that there does seem to be - I just took Mr Liley's submissions in relation to the question of - well, the distinction between the code and its operation and legislation on the face of it has some force, and that's what's prompted me. So it's not a reflection of anything else in terms of where I am with the case.

PN177

MR EVANS: Certainly, Deputy President. That's no problem with us. We maintain the position that it's not incorporated, but if that is going to be the sole barrier of approval our client is prepared to give that undertaking that 8.3 of the enterprise agreement will have no effect.

PN178

THE DEPUTY PRESIDENT: Thank you. All right. Thank you everybody for your submissions, it's been very helpful. The Commission is adjourned.

ADJOURNED INDEFINITELY [1.58 PM]

LIST OF WITNESSES, EXHIBITS AND MFIs

EXHIBIT #A1 STATUTORY DECLARATION OF EMILY JEFFREY PN14